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DATIN SERI ROSMAH MANSOR v. PEGUAM NEGARA/PENDAKWA RAYA & ORS

HIGH COURT MALAYA, KUALA LUMPUR
AHMAD KAMAL MD SHAHID J
[JUDICIAL REVIEW APPLICATION NO: WA-25-411-06-2022]
B 13 SEPTEMBER 2022

Abstract – *The time frame in applying for judicial review is fundamental and goes to jurisdiction. Whether the application has merit or not, is irrelevant in a judicial review application unless there is a good reason as to why extension of time shall be given, as prescribed under O. 53 r. 3(7) of the Rules of Court 2012.*

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ADMINISTRATIVE LAW: *Judicial review – Application for – Allegation that Senior Deputy Public Prosecutor had no valid fiat to prosecute in case – Whether application made within time frame – Whether there was good reason for extension of time – Whether application abuse of process of court – Whether application had merits – Whether court had jurisdiction to hear application – Rules of Court 2012, O. 53 r. 3(1), (6), (7)*

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The applicant filed an *ex parte* application for leave to make an application for judicial review, under O. 53 r. 3(1) of the Rules of Court 2012 ('ROC'). The applicant sought the following reliefs, *inter alia*: (i) a declaration that the appointment of Datuk Seri Gopal Sri Ram ('third respondent') as Senior Deputy Public Prosecutor ('Senior DPP') in the case of *PP v. Rosmah Mansor*, which was commenced in the Sessions Court and later at the High Court ('*Solar* case'), under ss. 376 and 379 of the Criminal Procedure Code, *vide* a *fiat* dated 8 July 2020 ('first *fiat*'), oral *fiat* as averred in the affidavit of Tommy Thomas dated 11 March 2021 ('second *fiat*') and the *fiat* given by the first respondent dated 21 March 2021 ('third *fiat*') was *ultra vires*, illegal, irregular, suffered from procedural impropriety and was defective; (ii) an order of *certiorari* to quash/set aside the appointment of the third respondent as Senior DPP in the *Solar* case; (iii) a declaration that the *Solar* case proceedings from 15 November 2018 to the close of the prosecution's case and to date was null and void and a mistrial; (iv) a declaration that the applicant be acquitted and discharged from all the charges under s. 16(a)(A) of the Malaysian Anti-Corruption Commission Act 2009 in the *Solar* case; and (v) an order for the proceedings in the *Solar* case to be stayed pending the disposal of this judicial review application. The respondents raised three preliminary objections, specifically: (i) whether the application was made within time under O. 53 r. 3(6) of the ROC; (ii) if the answer to (i) was in the negative, whether there was a good reason for extension of time under O. 53 r. (7) of the ROC; and (iii) whether this application was an abuse of the process of the court.

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Held (dismissing application):

(1) An application for leave for judicial review made under O. 53 r. 3(6) of the ROC, challenging the third respondent's *fiat*, must be filed within three months from the date when the grounds of the application first arose or when the decision was first communicated to the applicant. In the present application, the charge was preferred against the applicant on 15 November 2018 whereby the third respondent appeared as the Senior DPP in the case. On 8 April 2021, a copy of *fiat* was first communicated. This application for leave for judicial review was only filed by the applicant on 24 June 2022. This was clearly beyond the three-month time frame, as stipulated under O. 53 r. 3(6) of the ROC. There had been a delay on the part of the applicant in filing the application for leave for judicial review. (paras 73 & 74)

(2) The applicant's averments did not constitute a good reason for an extension of time. The applicant's excuse that she was only aware of the grounds and informed by her counsel *via* email on 6 July 2022 at 2.17pm was unacceptable. The said averments did not explain the delay and it was not substantiated with any particulars or documentary evidence. Therefore, this court had no jurisdiction to hear this application for leave to commence judicial review on the ground that the time frame of three months under O. 53 r. 3(6) of the ROC had not been complied with. Whether the applicant had merits or not was irrelevant. It was not necessary for this court to discuss the third preliminary issue. The preliminary objections raised by the respondents should be allowed. It was not necessary to deal with the merits of the application. (paras 82-84 & 88)

Case(s) referred to:

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(refd)***

Association Of Bank Officers, Peninsular Malayan v. Malayan Commercial Banks Association [1990] 2 ILR 308 SC ***(refd)***

Chong Wee Been lwn. Lembaga Pencegahan Jenayah & Yang Lain [2017] 1 LNS 903 HC ***(refd)***

Ketua Pengarah Kastam Dan Eksais v. Coach Malaysia Sdn Bhd [2019] 4 CLJ 454 CA ***(refd)***

Kijal Resort Sdn Bhd v. Pentadbir Tanah Kemaman & Anor [2015] 3 CLJ 861 FC ***(refd)***

Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd [2010] 5 CLJ 123 CA ***(refd)***

Mersing Omnibus Co Sdn Bhd v. The Minister Of Labour & Manpower & Anor [1983] 2 CLJ 7; [1983] CLJ (Rep) 266 FC ***(refd)***

Muhammad Shafee Md Abdullah v. Peguam Negara/Pendakwa Raya Malaysia & Ors And Another Case [2020] 10 CLJ 532 HC ***(refd)***

P Maradeveran Periasamy & Ors v. Suruhanjaya Pilihan Raya & Anor [2019] 6 CLJ 173 CA ***(refd)***

Pendor Anger & Ors v. Ketua Pengarah Jabatan Alam Sekitar & Ors [2012] 1 CLJ 346 HC ***(refd)***

Rosmah Mansor v. PP [2021] 10 CLJ 638 HC ***(refd)***
Seruan Gemilang Makmur Sdn Bhd v. Pegawai Kewangan Negeri Pahang [2016] 4 CLJ 100 CA ***(refd)***
SIS Forum (Malaysia) v. Kerajaan Negeri Selangor; Majlis Agama Islam Selangor (Intervener) [2022] 3 CLJ 339 FC ***(refd)***
Syarikat Sebangun Sendirian Bhd v. Datuk Patinggi Dr Abang Hj Abdul Rahman Zohari Tun Datuk Abang Hj Openg, Chief Minister Of Sarawak And Minister Of Urban Development And Natural Resources & Ors [2021] 1 LNS 2399 HC ***(refd)***
Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors [2006] 1 CLJ 927 CA ***(refd)***
Tunku Yaacob Holdings Sdn Bhd v. Pentadbir Tanah Kedah & Ors [2015] 3 CLJ 1017 FC ***(refd)***
Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor [2013] 4 CLJ 193 FC ***(refd)***
WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 3
Criminal Procedure Code, ss. 376(3), (3A), 379
Malaysian Anti-Corruption Commission Act 2009, s. 16(a)(A)
Rules of Court 2012, O. 53 rr. 2(4), 3(1), (6), (7)

For the applicant - Jagjit Singh, Akberdin Abdul Kader, Azrul Zulkifli Stork, Ummi Kartini Abd Latif, Meor Hafiz Salehan, Ardy Suffian Akberdin & Muhammad Ameer Hafiy Amri (PDK); M/s Akberdin & Co
For the Attorney General's Chambers - Shamsul Bolhassan; FC & Nur Syazwani Abdul Aziz; SFC
For the putative 3rd respondent - in person

Reported by Lina E

JUDGMENT

Ahmad Kamal Md Shahid J:

Introduction

[1] On 24 June 2022, the applicant filed an *ex parte* application for leave to make an application for judicial review under O. 53 r. 3(1) of the Rules of Court 2012 (ROC).

[2] This application for leave is premised on the allegation that the third respondent has no valid fiat to prosecute the applicant since the criminal proceedings commenced on 15 November 2018.

[3] In this application for leave, the applicant seeks the reliefs as follows:

(i) pengisytiharan/deklarasi bahawa perlantikan responden ketiga sebagai Timbalan Pendakwa Raya Kanan bagi kes *PP v. Rosmah Mansor* yang bermula di Mahkamah Sesyen Jenayah, Kuala Lumpur melalui Kes Jenayah No: WA-62R-54-11-2018 & WA-62R-18-04-2019, dan kemudiannya di Mahkamah Tinggi Jenayah Kuala Lumpur melalui Kes Jenayah No: WA-45-9-03-2019 & WA-45-19-

07-2019 ('kes *Solar* tersebut'), di bawah Sesyen 376(3) dan Sesyen 379 Kanun Prosedur Jenayah melalui surat perlantikan (fiat) bertarikh 8.07.2020 ('fiat versi pertama') oleh responden Pertama, adalah *ultra vires*, salah di sisi undang-undang (illegal), tidak teratur (irregular), suatu ketidakaturan prosedur (procedural impropriety), dan cacat (defective) di bawah undang-undang yang matan;

(b) Suatu Perintah *Certiorari* untuk membatalkan dan/atau mengetepikan perlantikan responden Ketiga oleh responden Pertama sebagai Timbalan Pendakwa Raya Kanan di dalam kes *Solar* tersebut, yang perlantikannya dibuat melalui fiat versi pertama tersebut;

(c) Pengisytiharan/Deklarasi bahawa fiat versi pertama tersebut tidak terpakai untuk pendakwaan ke atas Pemohon bagi kes *Solar* tersebut kerana responden Ketiga dilantik oleh responden Pertama sebagai Timbalan Pendakwa Raya Kanan bagi mengetuai kes pendakwaan berkaitan 1 Malaysia Development Berhad (1MDB) sepertimana tajuk fiat versi pertama tersebut;

(d) Pengisytiharan/Deklarasi bahawa fiat versi pertama tersebut yang ditandatangani oleh Peguam Negara, Tan Sri Idrus Bin Harun pada 8.07.2020 (yang sepatutnya ditandatangani oleh Peguam Negara terdahulu, Tan Sri Tommy Thomas, pada dan/atau sebelum 15 November 2018, iaitu tarikh pendakwaan ke atas Pemohon), adalah salah dan tidak sah di sisi undang-undang;

(e) Pengisytiharan/Deklarasi bahawa fiat versi pertama tersebut yang telah menyatakan nombor-nombor kes pendakwaan ke atas Pemohon Iaitu Kes Jenayah No.: WA-45-9-03/2019 & WA-45-19-07/2019 (Mahkamah Tinggi), menunjukkan fiat versi pertama tersebut dibuat selepas pendakwaan ke atas Pemohon dijalankan, dan ianya merupakan suatu pemikiran semula (afterthought) responden Pertama terhadap isu perlantikan responden Ketiga di dalam kes *Solar* tersebut;

(f) Pengisytiharan/Deklarasi bahawa responden Ketiga telah memperdaya (deceived) Mahkamah yang Mulia apabila mengetuai pihak responden Pertama di dalam kes *Solar* ini yang bermula pada 15 November 2018 tanpa apa-apa fiat, sehingga fiat versi pertama bertarikh 8.07.2020 diberikan. Tindakan responden Ketiga ini adalah suatu penyalahgunaan proses Mahkamah apabila telah membuat representasi secara tingkah laku (conduct) atau lisan (oral) bahawa kononnya responden Ketiga mempunyai fiat daripada responden Pertama semenjak 15 November 2018 bagi kes *Solar* tersebut;

(g) Pengisytiharan/Deklarasi bahawa perlantikan responden Ketiga sebagai Timbalan Pendakwa Raya Kanan bagi kes *Solar* tersebut yang kononnya secara lisan di bawah Seksyen 376(3) Kanun Prosedur Jenayah dan keperluan surat bertulis di bawah Seksyen 379 Kanun Prosedur Jenayah adalah tidak perlu, sepertimana yang dinyatakan oleh Tan Sri Tommy Thomas bagi pihak responden

Pertama, di dalam Afidavit Balasan (No. 2) bertarikh 11.05.2021 ('fiat versi kedua') bagi Permohonan Jenayah No: WA-44-114-05/2021 & WA-44-117-05/2021, adalah *ultra vires*, salah di sisi undang-undang (illegal), tidak teratur (irregular), tidak rasional (irrationality), suatu ketidakaturan prosedur (procedural impropriety), dan cacat (defective) di bawah undang-undang yang matan;

(h) Suatu Perintah *Certiorari* untuk membatalkan dan/atau mengetepikan Perlantikan responden Ketiga oleh responden Pertama sebagai Timbalan Pendakwa Raya Kanan di dalam kes *Solar* tersebut, yang kononnya dibuat secara lisan yang dinyatakan di dalam fiat versi kedua tersebut;

(i) Pengisytiharan/Deklarasi bahawa fiat versi kedua adalah tidak wujud memandangkan Tan Sri Tommy Thomas, di dalam bukunya – '*My Story: Justice in Wilderness*' ('buku tersebut'), yang diterbitkan pada tahun 2021, di muka surat 250, di mana beliau telah mengakui dan menyatakan, "I appointed Sri Ram, under Section 376(3), to deal with the investigation and prosecution of 1MDB matters", menunjukkan bahawa perlantikan Datuk Seri Gopal Sri Ram adalah berkaitan dengan "1MDB" dan bukanlah kes *Solar* tersebut;

(j) Pengisytiharan/Deklarasi bahawa perlantikan responden Ketiga sebagai Timbalan Pendakwa Raya Kanan bagi kes *Solar* tersebut di bawah Seksyen 376(3) Kanun Prosedur Jenayah, melalui Surat Perlantikan (fiat) bertarikh 21.05 2021 ('fiat versi ketiga') oleh responden Pertama, adalah *ultra vires*, salah di sisi undang-undang (illegal), tidak teratur (irregular), suatu Ketidakaturan prosedur (procedural impropriety), tidak bersepadanan (proportionality) dan cacat (defective) di bawah undang-undang yang matan;

(k) Suatu Perintah *Certiorari* untuk membatalkan dan/atau mengetepikan perlantikan responden Ketiga oleh responden Pertama sebagai Timbalan Pendakwa Raya Kanan di dalam kes *Solar* tersebut, yang perlantikannya dibuat melalui fiat versi ketiga;

(l) Pengisytiharan/Deklarasi bahawa perlantikan responden Ketiga sebagai Timbalan Pendakwa Raya Kanan melalui fiat versi ketiga tersebut oleh responden Pertama tidak boleh berkuatkuasa secara kebelakangan (retrospective) kerana memprejudiskan hak-hak Pemohon di bawah undang-undang;

(m) Pengisytiharan/Deklarasi bahawa pendakwaan yang diketuai oleh responden Ketiga ini secara terang-terangan salah dan mengakibatkan pendakwaan yang dijalankan oleh responden Ketiga adalah tanpa kuasa (authority), yang diperuntukkan sama ada di bawah *inter alia* Seksyen 376, 377, 378, 379 atau 380A Kanun Prosedur Jenayah;

(n) Pengisytiharan/Deklarasi bahawa tindakan responden Ketiga mengendalikan kes *Solar* tersebut adalah suatu tindakan penyalahgunaan proses Mahkamah dan perbuatan menghina Mahkamah yang Mulia ini;

(o) Pengisytiharan/Deklarasi bahawa keseluruhan prosiding pendakwaan dan perbicaraan penuh bagi kes *Solar* tersebut yang berlangsung semenjak 15 November 2018 sehingga pihak Pembelaan menutup kesnya dan sehingga hari ini, adalah tidak sah dan terbatal (null and void), serta berupa suatu perbicaraan silap (mistrial);

(p) Pengisytiharan/Deklarasi bahawa oleh kerana prosiding kes *Solar* tersebut adalah tidak sah dan terbatal (null and void), serta berupa suatu perbicaraan silap (mistrial), maka Pemohon, selaku Orang Kena Tuduh (OKT) hendaklah dilepaskan dan dibebaskan (acquitted and discharged) daripada semua pertuduhan-pertuduhan yang dihadapinya di bawah Seksyen 16(a)(A) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 [Akta 694] di dalam kes *Solar* tersebut;

(q) Pengisytiharan/Deklarasi bahawa apa-apa jua keputusan yang telah dibuat oleh Mahkamah bagi kes *Solar* tersebut adalah tidak sah dan terbatal (null and void) memandangkan responden Ketiga tidak mempunyai apa-apa surat perlantikan (fiat) yang sah daripada responden Pertama untuk, bertindak sebagai Timbalan Pendakwa Raya Kanan di dalam kes *Solar* tersebut;

(r) Pengisytiharan/Deklarasi bahawa perlantikan responden Ketiga sebagai Timbalan Pendakwa Raya Kanan oleh responden Pertama bagi kes *Solar* tersebut, melalui fiat versi pertama dan/atau fiat versi kedua dan/atau fiat versi ketiga adalah:

(i) kesilapan undang-undang (illegality);

(ii) tidak rasional (irrationality);

(iii) ketidakaturan prosedur (procedural impropriety); dan

(iv) tidak bersepadanan (proportionality).

(s) Suatu Perintah Penggantungan Prosiding bagi kes *Solar* tersebut diberikan sementara pelupusan (disposal) Permohonan Semakan Kehakiman di sini;

(t) Suatu Perintah bahawa responden Ketiga dihalang dan/atau diiarang untuk terus bertindak sebagai Timbalan Pendakwa Raya Kanan dan/atau atas apa-apa kapasiti, untuk hadir bagi pihak responden Pertama di Mahkamah Tinggi Kuala Lumpur bagi kes *Solar* tersebut dan/atau Mahkamah Rayuan dan/atau Mahkamah Persekutuan;

(u) Suatu Perintah bahawa responden Pertama dihalang dan/atau dilarang daripada terus memberi kuasa kepada responden Ketiga untuk bertindak sebagai Timbalan Pendakwa Raya Kanan dan/atau atas apa-apa kapasiti, untuk hadir bagi pihak responden Pertama di dalam kes *Solar* tersebut;

(v) Suatu Perintah bahawa responden Pertama dihalang dan/atau dilarang daripada memberi kuasa kepada responden Ketiga untuk bertindak sebagai Peguam Kanan Persekutuan dan/atau atas apa-apa kapasiti, untuk hadir bagi pihak responden Pertama di dalam Permohonan Semakan Kehakiman di sini;

(w) Suatu Perintah pelanjutan masa sekiranya Mahkamah berpandangan bahawa pemfailan di sini adalah di luar had masa yang ditetapkan di bawah Aturan 53 Kaedah 3(6) Kaedah-Kaedah Mahkamah 2012;

(x) Kos; dan

(y) Seperti yang diperlukan dan/atau berbangkit dan/atau selanjutnya dan/atau perintah lain, relif-relif dan/atau arahan dari Mahkamah yang Mulia yang dianggap sesuai dan wajar.

[4] From the reading of the above 25 reliefs sought, notable reliefs are as follows:

(i) a declaration that the appointment of third respondent as Senior Deputy Public Prosecutor (Senior DPP) in the case of *PP v. Rosmah Mansor* which was commenced in the Sessions Court, Kuala Lumpur *vide* Criminal Case No. WA-62R-54-11-2018 and WA-62R-18-04-2019 and later in the High Court of Kuala Lumpur Criminal Case No. WA-45-9-02-2019 (the *Solar* case), under ss. 376 and 379 of the Criminal Procedure Code *vide* a fiat dated 8 July 2020 (first fiat), oral fiat as averred in the affidavit of Tommy Thomas dated 11 May 2021 (second fiat) and the fiat given by the first respondent dated 21 May 2021 (third fiat) is *ultra vires*, illegal, irregular, suffers from procedural impropriety and defective under trite law;

(ii) an order of *certiorari* to quash/set aside the appointment of the third respondent as Senior DPP in the *Solar* case, that the appointment made *via* the first, second and third fiats;

(iii) a declaration that the *Solar* case proceedings from 15 November 2018 to the close of the prosecution's case and to date is null and void, a mistrial;

(iv) a declaration that the applicant to be acquitted and discharged from all the charges under s. 16(a)(A) of the Malaysian Anti-Corruption Commission Act 2009 in the *Solar* case; and

(v) an order for the proceedings in the *Solar* case stay pending the disposal of this judicial review application.

[5] The gist of the reliefs is that the third respondent has no valid fiat to prosecute her rendering the whole trial of the *Solar* case null and void, and therefore she must be acquitted and discharged.

[6] After the hearing, I dismissed the applicant's application (encl. 1). This judgment contains the full reasons for my decision.

Chronology Of Events And Background Facts

[7] In dealing with the above issue, it is crucial to understand the relevant chronology of events and background facts. As far as only the *Solar* case is concerned, the applicant had filed three applications related to the fiat of the third respondent in the Criminal High Court before Mohamed Zaini J.

[8] Those cases were (i) WA-44-132-07-2020 (exh. DSRM-10), (ii) WA-114-05-2021 (exh. DSRM-20) and (iii) WA-117-05-2021 (exh. DSRM-21) and could be found in relevant exhibits attached by the applicant.

(i) WA-44-132-07-2020 – Request For Production Of Fiat

[9] On 8 July 2020, prior to the decision at the end of the prosecution's case, the applicant filed an application seeking for the production of the third respondent's letter of appointment to conduct the criminal prosecution for her case under ss. 376(3), 376(3A) and 379 of the Criminal Procedure Code (CPC).

(ii) WA-114-05-2021 And (iii) WA-117-05-2021 – Challenges To The Validity Of The Fiat

[10] On 6 May 2021, the applicant filed two notices of motion (WA-114-05-2021 & WA-117-05-2021) in relation to the validity of the appointment of the third respondent.

The Decision Of Mohamed Zaini J (Exhibit DSRM-7)

[11] In the affidavit of support, the applicant attached exh. DSRM-7 which is the judgment of Mohamed Zaini J reported as *Rosmah Mansor v. PP* [2021] 10 CLJ 638. The decision was on the applicant's both applications to challenge the validity of the appointment of the third respondent. It was reported and said by Mohamed Zaini J that the majority of the reliefs sought in these two applications are similar and overlapping. The gist of the orders sought by the applicant in these two applications are for the following declarations:

(i) that the appointment of third respondent as Senior DPP under the first written fiat was illegal, irregular and defective;

(ii) that the appointment of third respondent could not be effected retrospectively as the first written fiat was done after her cases had reached the defence stage and would prejudice her;

(iii) the first written fiat was titled "Re: 1MDB prosecution" and therefore not applicable for her cases;

(iv) the first written fiat is invalid as it was signed by the current Attorney General when it should have been signed by his predecessor, Tan Sri Tommy Thomas (TT), who was the Attorney General when she was charged;

(v) that the third respondent had abused the court's process and is in contempt of court by conducting the prosecution's team from the onset; and

(vi) that the proceedings against her were null and void and a mistrial, and that she be acquitted and discharged from all the charges.

[12] On 24 September 2021, Mohamed Zaini J dismissed both applications.

The Decision Of The Court Of Appeal (Exhibit DSRM-4)

[13] Dissatisfied with the decision of the High Court, the applicant appealed to the Court of Appeal.

[14] At the Court of Appeal, a jurisdictional point on whether the High Court exercising its criminal jurisdiction has the power to grant the declaratory reliefs sought by the applicant was raised as a preliminary objection by the respondent.

[15] On 22 March 2022, the Court of Appeal dismissed the appeal based on a preliminary objection by the respondent. The Court of Appeal made no pronouncement on the substantive merits of the applications.

Order Of The Federal Court (Exhibit DSRM-1)

[16] Dissatisfied with the decision of the Court of Appeal, the applicant appealed to the Federal Court.

[17] On 27 May 2022, the Federal Court dismissed the appeal. The relevant part of the order of the Federal Court is as follows:

> ... DAN SETELAH MEMBACA Notis Rayuan dan Rekod-Rekod Rayuan yang kesemuanya difailkan di sini DAN SETELAH MENDENGAR hujahan pihak-pihak yang tersebut di atas MAKA ADALAH SEBULAT SUARA DENGAN INI DIPERINTAHKAN bahawa bantahan awal oleh Perayu untuk Datuk Seri Gopal Sri Ram tidak berhujah didalam rayuan ini ditolak DAN SELANJUTNYA DIPERINTAHKAN bahawa rayuan Perayu adalah ditolak maka keputusan oleh Mahkamah Rayuan yang membenarkan Bantahan Awal responden bahawa Mahkamah Jenayah tiada bidang kuasa untuk memberi relif-relif bagi perintah-perintah deklarasi yang dipohon Perayu dalam Notis Usul Perayu bertarikh 6.5.2021 yang difailkan di Mahkamah Tinggi Kuala Lumpur (Perbicaraan Jenayah No. WA-45-9-03/2019 dan WA-45-19-07/2019) dan menolak rayuan Perayu *inter alia* bagi perlucutan kelayakan Datuk Seri Gopal Sri Ram sebagai Timbalan Pendakwa Raya Kanan seperti mana yang dipohon dalam Notis Usul bertarikh 6.5.2021 yang mengekalkan perintah Mahkamah Tinggi adalah disahkan.

[18] From the above order of the Federal Court, it shows that the Federal Court affirmed the decision of the Court of Appeal in allowing the preliminary objection by the respondent on a jurisdictional point.

Main Issue – Whether The Applicant Has An Arguable Case In Seeking Declaratory Reliefs To Challenge The Validity Of Fiat Of The Third Respondent

[19] In encl. 29, the applicant submitted that there is merit in this application and it is shown *prima facie* that this application is not frivolous or vexatious and there is some substance in the grounds supporting the application.

[20] The applicant further submitted that leave shall be granted in viewing that this case is fit for further consideration.

[21] The applicant also submitted that she has *locus standi* to initiate this leave application for judicial review as she is a person adversely affected by the decision, action or omission in relation to the exercise of the public duty or function of the respondents.

[22] Lastly, the applicant submitted that she has at least a sufficient interest in the respect of the matter to be litigated because of the invalid fiats which results in the whole *Solar* case being null and void.

[23] On the other hand, the Attorney General's Chambers (AGC) submitted that this application must be dismissed forthwith as there is no arguable case and this application is nothing but frivolous and vexatious, a hopeless case which does not merit further investigation on a full inter party basis.

[24] The putative third respondent submitted that the applicant failed to show that her application is not frivolous or vexatious. The putative third respondent argued that there is already a judgment of the Criminal High Court that has held that his appointment is valid.

[25] I am aware that in considering whether leave to be granted or not, I am guided by the test propounded by the Federal Court in *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478; [2012] 4 MLRA 257; [2012] 4 MLJ 296. Suriyadi Halim Omar FCJ (as he then was) in delivering the judgment stated the followings:

> Without the need to go into depth of the abundant authorities, suffice if we state that leave may be granted *if the leave application is not thought of as frivolous, and if leave is granted, an arguable case in favour of granting the relief sought at the substantive hearing may be the resultant outcome. A rider must be attached to the application though ie, unless the matter for judicial review is amenable to judicial review absolutely no success may be envisaged*.
>
> (emphasis added)

[26] The principles governing the application for leave to commence judicial review proceedings have also been set out in *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2006] 1 CLJ 927; [2006] 5 MLJ 60; [2006] 1 MLRH 507 where Gopal Sri Ram JCA (as he then was) held:

> ... the High Court **should not go into the merits of the case at leave stage**. Its role is only to see if the application for leave is frivolous ... So too will the court be entitled to refuse leave if it a case where the subject matter of the review is one which by settled law (either written law of the common law) is non-justiciable.
>
> (emphasis added)

[27] In *Association Of Bank Officers, Peninsular Malayan v. Malayan Commercial Banks Association* [1990] 2 ILR 308; [1990] 1 MLRA 324, the then Supreme Court held that the guiding principle in granting an order of *certiorari* are that the applicants must show *prima facie* that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application. The then Supreme Court stated the followings:

> [7] At the outset of the hearing of the appeal before us we indicated to the parties that we would hear submissions on the issue of leave only. After giving due consideration to the evidence in this case and the submissions advanced by the parties we were of the view that leave to apply for an order of *certiorari* ought to have been given. In his grounds of judgment the learned judicial commissioner had gone further than the leave stage and embarked on substantial issues on merit. We did not think that this was the right approach when the application for leave to apply for an order of *certiorari* is made. *The guiding principles ought to be that the applicants must show prima facie that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application*. On the evidence in this case we found that the appellants had *prima facie* an arguable case for the granting of the relief they were seeking. Their application was not frivolous or vexatious. There were grounds to consider the allegations made by the appellants and which could only be properly heard and determined on the substantive application for an order of *certiorari* after leave has been granted.
>
> (emphasis added)

[28] Based on the above cases, the applicant has to satisfy the test propounded in order to secure leave to commence the judicial review proceedings. At this stage, the court need not go into the merits of the case, but only to see if the application for leave is frivolous or not and an arguable case in favour of granting those reliefs sought at the substantive hearing may be the resultant outcome.

The Preliminary Objections

[29] *Albeit* the above, this court must first address the following three preliminary issues arising from the preliminary objections by the AGC and putative third respondent:

(i) whether the application is made within time under O. 53 r. 3(6) of the ROC;

(ii) if the answer to (i) is in the negative, whether there is a good reason for extension time under O. 53 r. 3(7) of the ROC; and

(iii) whether this application is an abuse of the process of the court.

The Decision Of The Court

First Preliminary Issue – Whether The Application Is Made Within Time Under Order 53 Rule 3(6) Of The ROC

[30] The provision of O. 53 r. 3(6) of the ROC is as follows:

> An application for judicial review shall be made promptly and in any event within three months from the date **when the grounds of application first arose or when the decision is first communicated to the applicant**.
>
> (emphasis added)

[31] Based on the said provision, it is clear that the three-month limitation period starts to run either from when the grounds of the application first arose or when the decision is first communicated to the applicant.

When The Grounds Of The Application First Arose

[32] In raising a preliminary objection, the AGC submitted that the applicant failed to comply with O. 53 r. 3(6) of the ROC as the application was filed out of time. It should have been filed from the date of the grounds of the application first arose.

[33] The AGC further submitted that the applicant was charged on 15 November 2018. The applicant only filed the application for leave to file a judicial review application on 24 June 2022 whereby there is a delay of three years and three months and ten days in applying for judicial review.

[34] The AGC emphasised that even taking the date 8 April 2021 when a copy of fiat was given to the applicant for the first time, the applicant is still way out of time from the prescribed time frame of three months.

[35] The AGC further submitted that the three-month time limitation is a rigid rule that must be complied with by any party seeking to make an application for judicial review.

[36] On the other hand, the applicant submitted that the application was in order and filed within time.

[37] The applicant submitted that this application complied with the requirement of filing within three months from the date of the decision of the Federal Court on 27 May 2022. The applicant submitted that this application for leave was filed on 24 June 2022. The applicant took only 28 days from the date of the decision of the Federal Court to file this application for leave.

[38] I am minded that on 8 April 2021 at the Court of Appeal, the prosecution consented and produced a copy of the letter of appointment for the applicant's perusal. The letter of appointment dated 8 July 2020 was

signed by the current Attorney General, Tan Sri Idrus bin Harun and addressed to the putative third respondent. It referred to the appointment of the putative third respondent as Senior DPP *via* a letter dated 30 August 2018 in respect of the affairs of the 1Malaysia Development Bhd. The letter also stated that the putative third respondent is employed to conduct the criminal prosecution in respect of the applicant until its conclusion.

[39] Disgruntled with the above, only then the applicant on 6 May 2021 made two attempts *vide* the filing of WA-114-05-2021 and WA-117-05-2021 to challenge the validity of the appointment of the putative third respondent at the Criminal High Court before Mohamed Zaini J.

[40] Taking "when the grounds of the application first arose" in O. 53 r. 3(6) of the ROC, it is my considered view that the grounds of the application first arose on 15 November 2018 when the applicant was charged in the Sessions Court and/or where there is no production of fiat at all or on 8 April 2021 when the prosecution consented and produced a copy of the letter of appointment for the applicant's perusal, where it was revealed that Datuk Seri Gopal Sri Ram's fiat was only for 1MDB related cases.

When The Decision Is First Communicated To The Applicant

[41] The Putative third respondent submitted that even with reference to the alternative limb in O. 53 r. 3(6) of the ROC of "when the decision is first communicated to the applicant", this application for leave is still out of time.

[42] The Putative third respondent referred the court to O. 53 r. 2(4) of the ROC which governs as to whose decision a person who is adversely affected by it, shall be entitled to make an application for judicial review.

[43] The provision of O. 53 r. 2(4) of the ROC is as follows:

> Any person who is adversely affected by the **decision, action or omission** in relation to the **exercise of the public duty or function** shall be entitled to make the application.
>
> (emphasis added)

[44] The putative third respondent submitted that the decision of the Criminal High Court dated 24 September 2021 is a judicial decision of a superior court and not a decision about the exercise of the public duty or function as provided in O. 53 r. 2(4) of the ROC.

[45] The AGC adopted the submission of the putative third respondent, in addition, the AGC submitted that the three-month limitation is a rigid rule that must be complied with by any party seeking to make an application for judicial review.

[46] The AGC relied on the case of *Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd* [2010] 5 CLJ 123; [2010] 1 MLRA 325; [2010] 4 MLJ 360 where it was stated by the Court of Appeal as follows:

> [16] The High Court in its judgment was of the view that the 40 days specified under O. 53 r. 3(6) was not rigid. I am of the view the judge erred in ruling that the time frame prescribed by the rules is not rigid. **I am in agreement with the appellant's counsel that compliance with the time frame prescribed by the rules is fundamental as it goes to jurisdiction** (See *Mersing Omnibus Co. Sdn Bhd v. The Minister of Labour & Manpower & Anor* [1983] 2 CLJ 7; [1983] CLJ (Rep) 266).
>
> ...
>
> [60] **It is imperative that an application for judicial review is made within time** (*Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2008] 6 CLJ 473). Three recent authorities illustrate how those prescribed 40 days had been calculated. In *Bursa Malaysia Securities Bhd v. Gan Boon Aun* [2009] 5 CLJ 698, it was held that the material date from which the 40 days was to be calculated was the date when Bursa resisted attempts by GBA to preclude the Listing Committee from partaking in deliberations. In *Abdul Rahman Abdullah Munir & Ors v. Datuk Bandar Kuala Lumpur & Anor* [2008] 6 CLJ 805, it was held that the application had to be made within 40 days from when the decision was communicated to the applicant. And in *TR Rumah Lampoh Dana & Ors v. Government of Sarawak* [2005] 8 CLJ 705, it was in effect held that any application for judicial review had to be made within 40 days from the date of *gazette* of the Direction.
>
> (emphasis added)

[47] The AGC further submitted that the rationale for the rigid approach taken by the court is laid down in the case of *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865; [2010] 3 MLJ 145; [2010] 1 MLRA 524 where it was held by the Federal Court as follows:

> [15] Generally, this is due to the **stringent conditions or rules imposed by O. 53 of the RHC such as**:
>
> (a) Under O. 53 r. 3(6):
>
> > An application for judicial review shall be made promptly and in any event within 40 days from the date when the grounds for the application first arose or when the decision is first communicated to the applicant provided that the Court may, upon application and if it considers that there is a good reason for doing so, extend the period of 40 days.
>
> [16] One may ask what is the purpose of these conditions? *The basic objective is to protect those entrusted with the enforcement of public duties 'against groundless, unmeritorious or tardy harassment that were accorded to statutory*

A *tribunals or decision making public authorities by O 53, and which might have resulted in the summary, and would in any event have resulted in the speedy disposition of the application, is among the matters fit to be taken into consideration by the judge in deciding whether to exercise his discretion by refusing to grant a declaration ...'* as described in the celebrated case of *O'Reilly v. Mackman* [1982] 3 All ER 1124 at p 1133. *Further, there is also the need to reduce the delay in resolving such application in the interest of good administration*. As Lord Diplock in *O'Reilly v. Mackman* reiterated, The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision.

...

[61] It is our view that *when such an explicit procedure is created to cater for this purpose, then as a general rule all such application for such relief must commence according to what is set down in O. 53 of the RHC otherwise it would be liable to be struck off for abusing the process of the court*.

(emphasis added)

[48] On the other hand, the applicant submitted that the decision of the Federal Court was first communicated to her on 27 May 2022. The applicant further submitted that this application for leave was filed on 24 June 2022. The applicant took only 28 days from the date of the decision of the Federal Court when it was first communicated to her in filing this application for leave. It is therefore within time.

[49] The applicant referred the court to s. 3 of the Courts of Judicature Act 1964 where "decision" means "judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties."

[50] The applicant submitted that based on the facts of the case, the order of the Federal Court on 27 May 2022 falls under the alternative limb under O. 53 r. 3(6) of the ROC to mean 27 May 2022 is "when the decision is first communicated to the applicant". Therefore, filing of this application for leave on 24 June 2022 is within three months as required by the law and preliminary objection by the AGC and putative third respondent on limitation of time shall be dismissed.

[51] After hearing the party on "when the decision is first communicated to the applicant", I am not agreeable to the applicant's submission that the decision of the Federal Court on 27 May 2022 is "when the decision is first communicated to the applicant" under the alternative limb in O. 53 r. 3(6) of the ROC therefore the application for leave filed on 24 June 2022 is within the three-month limitation.

[52] I am of the view that the decision of the Criminal High Court dated 24 September 2021 does not fall within the purview of "decision" under O. 53 r. 2(4) of the ROC which provides "Any person who is adversely affected by the decision, action or omission in relation to the exercise of the public duty or function shall be entitled to make the application." A

[53] The decision of the Criminal High Court dated 24 September 2021 is neither a decision of the inferior courts nor tribunal in the exercise of the public duty or function in the legislative or Executive arm of the Government. B

[54] In fact, I am agreeable that the decision of the Criminal High Court dated 24 September 2021 is a judicial decision of a Superior Court and not a decision in relation to the exercise of the public duty or function under O. 53 r. 2(4) of the ROC. I am minded that judicial review acts as an effective check and balance on the legislative and Executive arms of Government. In the case of *SIS Forum (Malaysia) v. Kerajaan Negeri Selangor; Majlis Agama Islam Selangor (Intervener)* [2022] 3 CLJ 339; [2022] 3 MLRA 219; [2022] 2 MLJ 356; [2022] 2 AMR 633, Tengku Maimun Tuan Mat CJ stated that the function of a judicial review is as follows: C D

> [45] Judicial review is thus a core tenet of the rule of law which is inextricably linked to the notion of constitutional supremacy in a democratic form of Government. This is because a core feature of the rule of law is the doctrine of separation of powers, a corollary to which is the concept of check and balance. E
>
> [46] Judicial review – whether constitutional review or statutory review – is a fundamental aspect of check and balance and is the vehicle through which the judicial branch of Government can perform its constitutional function *vis-a-vis* the other branches of Government. F

[55] In this application for leave, it is not seeking this court to review a decision of an inferior court nor a decision in relation to the exercise of the public duty or function. I observe that the instant application is unprecedented in the context of the Malaysian judiciary where a party is actually seeking a High Court to judicial review the decision of another High Court. G

[56] Therefore, the submission of the applicant that she has fulfilled the three-month limitation in the alternative limb in O. 53 r. 3(6) of the ROC which states "when the decision is first communicated to the applicant" must fail for the fact that decision of superior court is not a decision in relation to the exercise of the public duty or function provided under O. 53 r. 2(4) of the ROC. H

[57] Hence, I answer the first issue as to whether the application is made within time under O. 53 r. 3(6) of the ROC in the negative. I

The Second Preliminary Issue – Whether There Is A Good Reason For Extension Time Under Order 53 Rule 3(7) Of The ROC

[58] The court has the discretion to grant an extension of time in applying for leave under O. 53 r. 3(7) of the ROC. The provision is as follows:

> The Court may, upon an application, extend the time specified in rule 3(6) if it considers that there is a good reason for doing so.

[59] Regarding the second issue of extension of time in filing judicial review, the applicant in her affidavit encl. 25 stated that this issue was only informed to her counsel on 6 July 2022 at 2.17pm *via* email. The applicant vehemently opposed to it as it is an abuse of the process of the court to prevent her from accessing justice and *male fide*. By referring to the chronology of events, the decision of the Court of Appeal and the order of the Federal Court, the applicant averred that this application was filed promptly after the order of the Federal Court in affirming the decision of the Court of Appeal. To conclude, the applicant averred that this application for leave is in order.

[60] In encl. 29, the counsel for the applicant submitted that the court has discretion to grant extension of time based on good reason as provided in O. 53 r. 3(7) of the ROC and with citation of cases of *Tunku Yaacob Holdings Sdn Bhd v. Pentadbir Tanah Kedah & Ors* [2015] 3 CLJ 1017; *Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd* (*supra*), *P Maradeveran Periasamy & Ors v. Suruhanjaya Pilihan Raya & Anor* [2019] 6 CLJ 173; [2019] 2 MLJ 70, *Syarikat Sebangun Sendirian Bhd v. Datuk Patinggi Dr Abang Hj Abdul Rahman Zohari Tun Datuk Abang Hj Openg, Chief Minister Of Sarawak And Minister Of Urban Development And Natural Resources & Ors* [2021] 1 LNS 2399, *Pendor Anger & Ors v. Ketua Pengarah Jabatan Alam Sekitar & Ors* [2012] 1 CLJ 346.

[61] On the other hand, in encl. 34 the AGO submitted that the reason advanced by the applicant to show that she had a good reason that a similar application was filed in a Criminal High Court and that the Federal Court had only decided on 27 May 2022 or any reason at all for that matter, for failing to file the application promptly apart is not a good reason.

[62] The AGC submitted that similar arguments have been canvassed and answered by the Court of Appeal in *Seruan Gemilang Makmur Sdn Bhd v. Pegawai Kewangan Negeri Pahang* [2016] 4 CLJ 100; [2016] 2 MLRA 597; [2016] 2 MLJ 225; [2016] 2 AMR 518 whereby the Court of Appeal held that apart from the uncertainty as to who the proper party was to be named as the respondent and the length of time it took to dispose of this issue through the appellate process in respect of the second *mandamus* application as not a good reason.

[63] In *Seruan Gemilang Makmur Sdn Bhd v. Pegawai Kewangan Negeri Pahang* (*supra*), the appellant had at the High Court applied for, *inter alia*, an extension of time to file for leave for judicial review, and for leave to apply for an order of *mandamus* against the respondent directing the respondent to make payment of the judgment sum in favor of the appellant. The appellant applied for leave to apply for judicial review (the first JR application) which was filed out of time. The first JR application was later withdrawn. The appellant filed another application for judicial review for an order of *mandamus*, not against the defendants in the original suit but against the Menteri Besar of Pahang (the second JR) and the High Court allowed the application. However, on appeal to the Court of Appeal by the Menteri Besar, the appeal was allowed on the ground that the Menteri Besar was the wrong party (the Menteri Besar's appeal). The proper party should be the respondent. In the Menteri Besar's appeal, it was held that the appellant's application for judicial review was filed out of time, and there was no application for leave for extension of time. The appellant's leave application to appeal to the Federal Court against the decision in the Menteri Besar's appeal was dismissed. The appellant then applied for an extension of time to make an application for judicial review and for leave to apply for judicial review. In the third JR, the appellant named the State Financial Officer as the respondent. In the application, the appellant also included an application for leave for extension of time to apply for judicial review. The High Court allowed the extension of time and granted leave to apply for judicial review. The respondent appealed to the Court of Appeal and the appeal was allowed with the court held that the leave application (with a prayer for extension of time) ought to have been served on the respondent. The case was then remitted to the High Court which then dismissed the application for extension of time and refused the appellant's leave to apply for judicial review. The appellant then appealed to the Court of Appeal.

[64] Zawawi Salleh JCA (as he then was) in delivering the majority judgment of the Court of Appeal stated the followings:

> [83] *We find no evidence on which we are satisfied that the appellant had a good reason for failing to file the application for leave for judicial review within time. There is nothing advanced by the appellant to show that he had a good reason, or any reason at all, for that matter, for failing to the file the application promptly apart from uncertainty as to who the proper party was to be named as the respondent and the length of time it took to dispose of this issue through the appellate process in respect of the second mandamus application.*
>
> [84] It is well established that public law remedies must be pursued with dispatch and so, time is of the essence. *The case for imposition of time limit on applications for judicial review was put most forcefully by Lord Diplock in O'Reilly v. Mackman* [1983] 2 AC 237 in the following terms at pp. 280-281:
>
> > The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in

A purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision.

(emphasis added)

B **[65]** The majority was of the view that the learned High Court Judge correctly held that Her Ladyship was bound by the finding of facts expressed by Jeffrey Tan JCA (as he then was) when the second *mandamus* application came up on appeal before the Court of Appeal. The majority further held that the appellant had no good reason for failing to file the application for leave for judicial review within time apart from the uncertainty as to who the C proper party was to be named as the respondent and the length of time it took to dispose of this issue through the appellate process in the respect of the second *mandamus* application.

[66] The AGC further submitted that either by taking the date of 15 November 2018 when the applicant was charged or even taking the date D of 8 April 2021 when a copy of fiat was given to the applicant for the first time, the applicant is still way out of time from the prescribed time frame of three months and there is no good reason given by the applicant. The putative third respondent adopted the submission of the AGC.

E **[67]** After reading and hearing the submission of the party, even though the applicant cited a number of cases to support that the court has the discretion to grant an extension of time, the applicant failed to clearly show how these cases would be helpful to her application for leave by merely citing relevant excerpts of the judgments.

F **[68]** In *Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor* [2013] 4 CLJ 193; [2013] 3 MLRA 525; [2013] 4 AMR 211; [2013] 4 MLJ 161, the Federal Court further explained that the applicant must justify the good reason for applying out of time to enable the court to exercise its discretion. Raus Sharif PCA (as he then was) stressed as follows:

G [30] Further, notwithstanding that the applicants are out of time, *whether pursuant to O. 53 r. 3(6) RHC the applicants have shown 'good reason' for delay on their part and there must be some material for the court to exercise its discretion* (See cases cited on the 2nd respondent's behalf – (i) *Tengku Anoomshah Tengku Zainai Abidin & Anor v. Collector Of Land Revenue, North East District, Penang & Anor* [1995] 3 CLJ 434 at p. 439 g-l, (ii) *Sabah Berjaya Sdn Bhd* H *v. Director General Of Inland Revenue Department & Anor* [1996] 1 LNS 93; [1996] 5 MLJ 366 at p. 375 F-l, (iii) *Gnanasundaram v. Public Services Commission* [1965] 1 LNS 41; [1966] 1 MLJ 157 at p. 158 B-C right column, (iv) *R v. Stratford - on - Avon District Council And Another, Ex Parte Jackson* [1985] 3 All ER 769 at p. 770 Held 2, (v) *R v. Secretary Of State For The Home Department Another, Ex Parte Ruddock And Others* [1987] 2 All ER 518 at p. I 521 hl).

(emphasis added)

[69] In *Ketua Pengarah Kastam Dan Eksais v. Coach Malaysia Sdn Bhd* [2019] 4 CLJ 454; [2019] 2 MLJ 716; [2019] 2 MLRA 377, the Court of Appeal emphasised that a single 'good reason' may be sufficient for the grant of an extension of time as stipulated under O. 53 r. 3(7) of the ROC. Abdul Rahman Sebli JCA (now FCJ) held as follows:

> [14] Order 53 r. 3(7), however, gives the court the discretion to grant an extension of time if it considers that there is a good reason for doing so. We reproduce below O. 53 r. 3(7) for ease of reference:
>
> > (7) The Court may, upon an application, extend the time specified in rule 3(6) if it considers that there is a good reason for doing so.
>
> [15] *By the terms of the order, one "good reason" is good enough to entitle the applicant to an extension of time. It is a matter for the judicial exercise of the judge's discretion. On the attitude of the appellate court in respect of the exercise by the judge of the discretion vested in him*, the Privy Council in *Ratnam v. Cumarasamy & Anor* [1964] 1 LNS 237; [1965] 1 MLJ 228 provided the following useful guideline:
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> > The principles upon which a court will act in reviewing the discretion exercised by the lower court are well settled. There is a presumption that the judge has rightly exercised his discretion (*Charles Osenton & Co v. Johnson* [1942] AC 130 per Lord Wright at p. 148). The court will not interfere unless it is clearly satisfied that the discretion has been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice (*Evans v. Bartlam* [1937] AC 473).
>
> ...
>
> [31] *The respondent's excuse for the inordinate delay in filing the leave application is unacceptable. It was the duty of the respondent to monitor its TAPS account and not to blame its own auditor for missing the dateline. The respondent's claim that it did not even know the password to its own TAPS account is hard to believe and is equally unacceptable*.
>
> [32] In any event*, the delay caused by the auditor, even if true, was the respondent's internal problem and had nothing to do with the appellant. The appellant should not be put at a disadvantage due to the respondent's lack of care in managing its TAPS account*.
>
> [33] In the circumstances, we were of the view, with due respect to the learned judge, that *she was wrong in accepting the reason as a "good reason" to justify an extension of time. It will be setting a dangerous precedent for the court to allow such kind of excuse as a way to overcome the limitation period prescribed by the law*.
>
> (emphasis added)

[70] In the case of *Chong Wee Been lwn. Lembaga Pencegahan Jenayah & Yang Lain* [2017] 1 LNS 903; [2017] MLRHU 558, the High Court dismissed the application for extension of time to challenge a police supervision order that was premised on the applicant's ignorance of his right to challenge such an order.

[71] In *Mersing Omnibus Co Sdn Bhd v. The Minister Of Labour & Manpower & Anor* [1983] 2 CLJ 7; [1983] CLJ (Rep) 266; [1983] 1 MLRA 117; [1983] 2 MLJ 54, the Federal Court held that jurisdiction does not originate in the consent of the parties and cannot be established where it is absent, by such consent or acquiescence. The Federal Court also held that leave should not be granted without the time prescribed and neither sought an extension of time nor accounted for the delay to the satisfaction of the judge within its explicit requirements. The judge had no jurisdiction to do so. Eusoffe Abdoolcader FJ in delivering the judgment made a very point on time limitation in a judicial review application as follows:

> At the outset of the hearing of this appeal we raised the question of the appellant being out of time in his application for leave for *certiorari* in the light of *the provisions of O. 53 r. 1A of the Rules of the High Court 1980, the relevant part of which specifically provides that leave shall not be granted to apply for an order of certiorari unless the application for leave is made within six weeks after the date of the proceeding or the delay is accounted for to the satisfaction of the Court or Judge to whom the application for leave is made*. As the decision of the Minister sought to be impugned is dated 23 November 1981, the period of six weeks would, on a computation under O. 3 & 2(2) of the Rules of the High Court, expire on 5 January 1982, and as the application for leave was made on 9 January 1982 *the appellant was clearly out of time and no extension of time was sought nor the delay accounted for to the satisfaction of the learned Judge who heard the application as required by the rule*. Apparently, this point completely escaped all parties involved, as a result perhaps of an affliction of incorrigible somnolence that seems to pervade the perception of the law and practice of the profession from time to time. *We took the point ourselves as it clearly goes to the jurisdiction of the Court from which leave to apply for certiorari was sought as O. 53 r. 1(1) stipulates that no application for an order of certiorari shall be made unless leave therefor has been granted and r. 1A which we have already adverted to enacts that leave shall not be granted except in accordance with its specific provisions*.
>
> (emphasis added)

[72] I am bound by the decision of *Mersing Omnibus* (*supra*) that the time frame in applying for judicial review is fundamental and goes to jurisdiction. Whether the application has merit or not is irrelevant in a judicial review application unless there is a good reason as to why the extension of time shall be given as prescribed in O. 53 r. 3(7) of the ROC.

[73] I am of the view that an application for leave for judicial review made under O. 53 r. 3(6) of the ROC challenging Datuk Seri Gopal Sri Ram's fiat must be filed within three months from the date when the grounds of the application first arose or when the decision was first communicated to the applicant.

[74] In the present application, the charge was preferred against the applicant on 15 November 2018, whereby Datuk Seri Gopal Sri Ram appeared as the Senior DPP in the case. On 8 April 2021, a copy of fiat was

first communicated. This application for leave for judicial review was only filed by the applicant on 24 June 2022. This is clearly beyond the three-month time frame as stipulated under O. 53 r. 3(6) of the ROC. There had been a delay on the part of the applicant in filing the application for leave for judicial review.

[75] I am also of the view that by following the cases of *Wong Kin Hoong & Ors (supra), Ketua Pengarah Kastam* (*supra*), the averments of the applicant in her affidavit encl. 25 that this issue was only informed to her counsel on 6 July 2022 at 2.17pm *via* email is not a cogent reason or material for the court to exercise its discretion nor a single good reason because the issue here is on the delay in filing the application for judicial review for either "when the grounds of the application first arose or when the decision is first communicated to the applicant", and definitely not on when the preliminary objection was brought to the applicant's attention as allegedly on 6 July 2022.

[76] As I have earlier answered the first issue as to whether the application is made within time under O. 53 r. 3(6) of the ROC, taking "when the grounds of the application first arose" in O. 53 r. 3(6) of the ROC, it is my considered view that the grounds of the application first arose on 15 November 2018 when the applicant was charged in the Sessions Court and/or where there is no production of fiat at all or on 8 April 2021 when the prosecution consented and produced a copy of the letter of appointment for the applicant's perusal but the applicant alleged that it is pertinent to 1MDB and related cases only and does not include the *Solar* case. The applicant should have filed her application seeking declaratory reliefs in a Civil High Court. By referring to *Chong Wee Been* (*supra*), it was held that the applicant's ignorance of his right to challenge a police supervision order is not a good reason for the court to grant an extension of time. Similarly, the same principle shall apply to the instant application that ignorance to seek declaratory reliefs in the correct High Court must not be accepted as a cogent reason or material for the court exercise its discretion to grant an extension of time.

[77] In addition, I would like to reiterate that taking the date of the order of the Federal Court dated 27 May 2022 as "when the decision is first communicated to the applicant" under the alternative limb in O. 53 r. 3(6) of the ROC must fail for the fact that decision of Superior Court is not a decision in relation to the exercise of the public duty or function provided under O. 53 r. 2 of the ROC.

[78] Therefore, I am of the view that there is no material or cogent reason or single good reason provided by the applicant for this court to exercise its discretion to grant an extension of time in filing this application for leave under O. 53 r. 3(7) of the ROC.

[79] Besides, in *Muhammad Shafee Md Abdullah v. Peguam Negara/Pendakwa Raya Malaysia & Ors And Another Case* [2020] 10 CLJ 532; [2021] 1 MLRH 159, the applicant filed both applications to challenge the appointment of Datuk Seri Gopal Sri Ram as Senior DPP in the criminal court as well as in the civil court by way of judicial review. Similarly, I am of the view that this judicial review application could have been filed simultaneously without waiting for the criminal application to be exhausted.

[80] Order 53 of the ROC sets out a specific procedure for an applicant to comply with in order to enable the applicant to invoke judicial review proceedings. Failure to adhere to the procedure will result in the application being dismissed or not entertained by the court. In the present application, there was a clear non-compliance by the applicant with the imperative requirement set out under O. 53 r. 3(6) of the ROC.

[81] It is trite that strict compliance with the requirements of O. 53 r. 3(6) of the ROC is mandatory. The mandatory nature of the requirements is clearly reflected in the word "shall" therein which means that there can be no exceptions unless an extension of time has been applied for and obtained (see *Kijal Resort Sdn Bhd v. Pentadbir Tanah Kemaman & Anor* [2015] 3 CLJ 861; [2016] 1 MLJ 544; [2015] 1 MLR A 255; [2015] 2 AMR 89).

[82] Following the above cases, I am also of the view that the applicant's averments do not constitute a good reason for an extension of time. The applicant's excuse that she was only aware of the grounds and informed by her counsel *via* email on 6 July 2022 at 2.17pm is unacceptable. The said averments did not explain the delay and it was not substantiated with any particulars or documentary evidence (see *Chong Wee Been* (*supra*)).

[83] Therefore, I am of the view that this court has no jurisdiction to hear this application for leave to commence judicial review on the ground that the time frame of three months under O. 53 r. 3(6) of the ROC has not been complied with. Whether the applicant has merits or not, is irrelevant.

[84] Therefore, based on the above, it is not necessary for me to discuss the third preliminary issue *ie*, whether this application is an abuse of the process of the court.

Conclusion

[85] For all the reasons given above, I am of the view that this application was filed out of time and does not satisfy the strict requirement on a time frame which is fundamental and goes to jurisdiction under O. 53 r. 3(6) of the ROC.

[86] Taking "when the grounds of the application first arose" in O. 53 r. 3(6) of the ROC, it is my considered view that the grounds of the application first arose on 15 November 2018 when the applicant was charged in the Sessions Court and/or where there is no production of fiat at all or

on 8 April 2021 when the prosecution consented and produced a copy of the letter of appointment for the applicant's perusal but the applicant alleged that it is pertinent to 1MDB and related cases only and does not include the *Solar* case.

[87] Since the leave for judicial review application was only filed by the applicant on 24 June 2022, it was clearly beyond the stipulated three months period. The application for an extension of time had also not been supported with good reason that it should be granted.

[88] Therefore, the preliminary objections raised by the AGC and putative third respondent should be allowed. It is not necessary to deal with the merits of the application.

[89] Hence, this court has no jurisdiction to grant leave to hear the substantive judicial review application. The applicant's application for leave to commence judicial review proceedings (encl. 1) is hereby dismissed.